LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1346

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

EDWARD L. CAREY
HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C. 20005
E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee 37901
ROBERT I. DOGGETT
2222 Kroger Building
1014 Vine Street
Cincinnati, Ohio 45202
M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, W. Va. 25301
Attorneys for Petitioner,
United Mine Workers of America

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

TABLE OF CONTENTS

Page

I. UMW'S REPLY TO RESPONDENTS' STATEMENT OF THE CASE 1

II. UMW'S REPLY TO RESPONDENTS' ARGUMENT THAT THE SIXTH CIRCUIT'S HOLDING CONCERNING THE CHALLENGED CLAUSES DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT 4

A. Contrary To Respondents, the Sixth Circuit's Opinion Herein Conflicts With This Court's *National Woodwork*, And With Opinions Of the D. C. Circuit 4

B. The Sixth Circuit's Prior *Canada Dry* Case Conflicts With the Sixth Circuit's Opinion Herein 8

C. Contrary to Respondents, UMW's Objectives Were Primary and Not Secondary, and the District Court So Found 8

D. UMW's Response to Respondents' Claim "There Is No Conflict Between the Circuits" 11

III. UMW'S REPLY TO RESPONDENTS' ARGUMENT THAT UMW COERCED RIVERTON AND DAVISON, AND THAT THERE IS NO CONFLICT WITH THE *CORONADO* CASES 13

The 1964 Work Stoppage 13

The 1966 Work Stoppage 13

Page

IV. UMW'S REPLY CONCERNING THE SIXTH CIRCUIT'S FAILURE TO FOLLOW RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE 22

V. UMW'S REPLY TO RESPONDENTS' CLAIM THAT DAVISON IS A PROPER PARTY 22

CONCLUSION 23

TABLE OF CASES

Brentwood Markets, 171 NLRB 1018 (1968) 8

Browning v. *Crouse*, 10 Cir., 356 F.2d 178 18

C. & O. Ry. Co. v. *Martin*, 283 U.S. 209, 219-20 18

Cala Foods, 172 NLRB No. 200, 69 LRRM 1189 8

Canada Dry Corp. v. *NLRB*, 6 Cir., 421 F.2d 907 (1970) 8, 13

Coronado Coal Co. v. *UMWA*. 268 U.S. 295, 304-05 ..... 14, 16, 19

Garmeada Coal Co. v. *UMW*, DC, E.D. Ky., 1954, 122 F.Supp. 512, aff'd. 6 Cir., 230 F.2d 945 21

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 12

Harnischfeger Corp. v. *Sheet Metal Workers*, 6 Cir., 436 F.2d 351, 355, 356 (1970) 15, 20, 21, 22

Houston Insulation Contractors Assn. v. *NLRB*, 386 U.S. 664 (1967) 10

Int. Ladies Garment Workers Union v. *NLRB*, D.C. Cir., 237 F.2d 545, 552 17

Page

Int. Union, UMWA, 76 LRRM 1396 13

Int. Union, UMWA v. *NLRB*, D.C. Cir., 399 F.2d 977, 980 (1968) 11

Lewis v. *Benedict Coal Co.*, 6 Cir., 259 F.2d 346 (1958) [modified on other grounds, 361 U.S. 459 (1960)] 17

Lewis v. *NLRB*, D.C. Cir., 350 F.2d 801 (1965) 11

Lewis v. *Pennington*, 400 F.2d 806, 814 (1968) cert. den. 393 U.S. 933, reh. den. 393 U.S. 1045 11

Local 761, Electrical Workers v. *NLRB*, 366 U.S. 667, 672, 680 4, 7

Local 1976, Carpenters v. *NLRB*, 357 U.S. 93, 98 (1958) 10

Moore v. *C. & O. Ry. Co.*, 340 U.S. 573, 578 19

NLRB v. *Local 825, Operating Engineers*, 400 U.S. 297, 304 7

National Woodwork Mfgrs. Assn. v. *NLRB*, 386 U.S. 612, 644 (1967) 4, 5, 10

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 340-41 19

Ramsey v. *UMW*, 416 F.2d 655 (1969), reversed on other grounds 401 U.S. 302 11, 12

Retail Clerks Union Local 770 v. *NLRB*, D.C. Cir., 296 F.2d 368, 373, 374 (1961) 6, 7

Seafarers Int. Union v. *NLRB*, D.C. Cir., 265 F.2d 585, 590 4

Teamsters v. *Humko*, 6 Cir., 287 F.2d 231, 242 20

Page

Teamsters, Local 710 v. NLRB, D.C. Cir., 335 F.2d 709, 713-14 (1964) 6, 7, 8

Tennessee Consolidated Coal Company v. UMWA, 6 Cir., 416 F.2d 1192, 1198, 1199 12

United Construction Workers v. Haislip Baking Co., 6 Cir., 323 F.2d 872 15

UMW v. Gibbs, 383 U.S. 715, 725 14, 16, 17, 19

UMW v. Gibbs, 383 U.S. 715, 728 (1966) 17

UMW v. Tennessee Consolidated Coal Company, et al., Case No. 1167, October Term, 1969 12

U.S. v. Int. Union, UMW, DC, D.C., 1943, 77 F. Supp. 867, aff'd. D.C. Cir., 177 F.2d 29 (1949) 16

U.S. v. Int. Union, UMW, DC, D.C., 1950, 89 F.Supp. 173 16, 20

U. S. v. Int. Union, UMW, D.C. Cir., 190 F.2d 865 (1951) 17

United Steelworkers of America v. NLRB, 376 U.S. 492 7

United Textile Workers v. Newberry Mills, Inc., 315 F.2d 217 (1963), cert. den. 375 U.S. 818 (1963) 18

Vulcan Materials Co. v. Steelworkers, 5 Cir., 430 F.2d 446, 456 (1970) 18

Walters v. Int. Assn. of Plumbers, 6 Cir., 323 F.2d 578 15

Page

STATUTES

Labor Management Relations Act, 1947, as amended 4

Section 8(b)(4) [29 USCA 158(b)(4)] 5, 10

Section 8(b)(4)(i)(ii)(A) [29 USCA 158(b)(4)(i)(ii)(A)] 10, 12, 13, 14

Section 8(b)(4)(i)(ii)(B) [29 USCA 158(b)(4)(i)(ii)(B)] 10, 12, 13, 14

Section 8(d) [29 USCA 158(d)] 19

Section 8(e) [29 USCA 158(e)] 2, 3, 5, 6, 7, 8, 11, 12, 22

Section 9 (29 USCA 159) 9

Section 301 (29 USCA 185) 19

Section 303 (29 USCA 187) 11, 15

MISCELLANEOUS

Federal Rules of Civil Procedure:

Rule 52(a) 2, 13, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1346

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

I. UMW'S REPLY TO RESPONDENTS' STATEMENT OF THE CASE.*

Despite Respondents' charge in its opposition brief (p. 6) that UMW's statement "is laced with irrelevancies, misstatements of fact, expressions of opinion and significant omissions", UMW believes that comparison of the record with its Statement of the Case will disclose it to be both accurate and fair. On the other hand, critical omissions and inaccuracies in Respondents' statements and arguments prompt UMW's instant reply,

*Parties and pagination references are referred to herein as in the certiorari petition, except the abbreviation "J.A. " refers to pages in the Joint Appendix. The opposition brief is referred to as "O.B.___". *All emphases herein are supplied, unless otherwise indicated.*

although time permits UMW to point out only the most blatant examples thereof.

The opposition brief's statement concerning the 1964 strike and Agreement (O.B. 9-14) is to be compared with Petitioner's statement concerning the 1964 work stoppage (Pet. 16-22); Respondents' statement concerning the 1966 strike and Agreement (O.B. 14-16) is to be compared with that of Petitioner (Pet. 22-24), including the corroborative evidence furnished by the Bureau of Labor Statistics, United States Department of Labor, concerning the 1966 stoppage, *which Respondents ignore;* and the opposition brief's statement of the district court's decision (O.B. 19-21) is to be compared with Petitioner's statement of the district court's conclusion concerning the two work stoppages (Pet. 24-26).

Not only does Respondents' opposition brief assiduously avoid directing the Court's attention to numerous undisputed facts, including, but not limited to, the bituminous coal industry's history[1] of collective bargaining and its relevant economic facts (Pet. 9-11), UMW's historic efforts to preserve work opportunities for its members through contractual restrictions (Pet. 11-15), but also the district court's findings pertaining thereto (Pet. 9-15), as well as to many of the district court's findings and conclusions of law that PWC, the 80-cent

---

[1]The district court affirmatively concluded that "the history of the union negotiations going back dozens of years (multiple and singular) which led to PWC and/or the 80-cent clause is relevant", avowing that "Any work preservation clause or any union standards clause will of necessity limit the right of an employer to deal with other employers or to handle their products" and "It is difficult to imagine such a clause which would not run afoul of 8(e)" [A. 47a (76)].

The Sixth Circuit was, as *insensitive* to the requirement of Rule 52(a), Federal Rules of Civil Procedure, that "Findings of fact shall not be set aside unless clearly erroneous" relating to the foregoing finding as it was as to all other district court findings pertaining to the validity of the challenged clauses in the 1964 and 1966 Agreements.

clause, and the coal lands clause of the 1964 and 1966 Agreements sought to protect the jobs and work of signatory employees and to maintain the Welfare Fund's integrity, and were permissive under the Act's 8(e).

The district court's findings and conclusions appear in the certiorari petition (pp. 13-16), to which reference is made. Though all of said findings and conclusions are cogent, crucially worthy of repetition are the district court's findings and conclusions that "neither PWC nor the 80-cent clause ran afoul of 8(e)"; that their purpose *clearly* was "to tackle in a successful way a legitimate problem of subcontracting and work preservation which had existed for decades and had been attacked for decades in unsuccessful contractual methods"; that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target"; that though a "secondary effect" was unionization of some non-union employers, it was "foreseeable and in that sense was a purpose at the time the clauses were negotiated"; and that the secondary purpose was an incident to the primary purpose, which was work preservation, and "obvious on the record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion [A. 55a (83-84)]. Specifically, with reference to Riverton, the district court concluded, *"On this record, one could only conclude that the 80-cent clause did exactly what it was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages"* [A. 55a (84)], noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" [A. 13a (42-43)]. It agreed, too, there was nothing secondary about the coal lands clause [A. 44a (73)].

II. UMW'S REPLY TO RESPONDENTS' ARGUMENT THAT THE SIXTH CIRCUIT'S HOLDING CONCERNING THE CHALLENGED CLAUSES DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Contrary To Respondents, the Sixth Circuit's Opinion Herein Conflicts With This Court's *National Woodwork*, And With Opinions Of the D. C. Circuit.

In contending the Sixth Circuit's opinion herein does not conflict with applicable opinions of this and other federal appellate courts (O.B. 24, 38, 45-50), Respondents ignore this Court's teaching in *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 672, that the Act's secondary boycott provisions are not to be literally construed because such construction would "ban most strikes historically considered to be lawful, so-called primary activity". Therein, this Court cautioned that "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line" and that "The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade" and it quoted, with approval, language from *Seafarers Int. Union* v. *NLRB*, D.C. Cir., 265 F.2d 585, 590, that " 'It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor' " the union's activity, including "employees of neutral employers".

In reversing the district court and directing judgment for Respondents, Respondents support the Sixth Circuit's action by an argument (O.B. 38-42) which ignores the district court's findings and conclusions that PWC, the 80-cent clause and the coal lands clause of

the 1964 and 1966 Agreements sought to protect the jobs and work of signatory employees and to maintain the Welfare Fund's integrity, and were permissive under the Act's Section 8(e), discussed in the certiorari petition (pp. 13-16).

Nor does Respondents' argument concern itself with *National Woodwork Mfgrs. Assn.'s*[2] admonishment to lower federal courts that determination whether Section 8(e) and Section 8(b)(4) is violated "cannot be made without an inquiry into whether, *under all the surrounding circumstances*, the Union's objective was preservation of work . . or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (386 U.S. 644). *Further, Respondents disregard UMW's charge of the Sixth Circuit's failure to inquire "whether, under all the surrounding circumstances, the Union's objective was preservation of work" when the district court's findings and conclusions that the challenged clauses were permissive under Section 8(e) were predicated upon undisputed facts relating to the bituminous coal industry's history of collective bargaining and its relevant economic facts, UMW's historical efforts to preserve work opportunities for its members through contractual restrictions, and UMW's achievement of the challenged clauses* (Pet. 9-15).

Moreover, Respondents were similarly unresponsive to UMW's answers (Pet. 37-38) to the Sixth Circuit's condemnation of the challenged clauses on the basis that "supplemental coal which Riverton and Davison were purchasing from signatory and nonsignatory

---

[2]*National Woodwork Mfgrs. Assn.* v. *NLRB*, 386 U.S. 612 (1967).

suppliers involved work which was never performed by their own employees".

Because Respondents would deprecate (O.B. 48) UMW's citations of *Teamsters, Local 710* v. *NLRB*, D.C. Cir., 335 F.2d 709, 713-14 (1964) and *Retail Clerks Union, Local 770* v. *NLRB*, D.C. Cir., 296 F.2d 368, 374 (1961) on their assertion that therein secondary objectives were not commingled, it becomes important to reiterate that in support of its finding that the challenged clauses did not violate Section 8(e), the district court found that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target"; that though a "secondary effect" was unionization of some non-union employers, it was "forseeable and in that sense was a purpose at the time the clauses were negotiated"; *that the secondary purpose was an incident to the primary purpose, which was work preservation and "obvious on that record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion* [A. 55a (83-84)]. Specifically, with reference to Riverton, the district court concluded, *"On this record, one could only conclude that the 80-cent clause did exactly what was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages"* [A. 55a (84)], noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" [A. 13a (42-43)]. It agreed, too, there was nothing secondary about the coal lands clause [A. 44a (73)].

Even if, as the Sixth Circuit declared (A. 71a), the coal "Riverton and Davison were purchasing from

signatory and nonsignatory suppliers involved work which was never performed by their own employees", nonetheless it involved work which Riverton's employees had the skills and experience to perform. *Teamsters, Local 710* recognizes that where the employees have the skills and experience to perform work claimed—as is true in the instant situation—even if the clause covered non-traditional work.

> "It would be difficult to deny that '[a] clause covering non-traditional work may be just as consecrated to the primary objective of bettering the lot of the bargaining unit employees and just as foreign to the congressional purpose for section 8(e) as those clauses involving only the work traditionally done within the bargaining unit'" (335 F.2d 714).

In addition to the quoted language in the certiorari petition (p. 38), *Retail Clerks* makes clear that when an employer "agrees in good faith to terms and conditions, he represents that if the employees accept and abide those terms they will have this employment. We think employees, even absent a specific anti-subcontracting provision, could enforce their right to the work contemplated by a bargaining agreement" (296 F.2d 373).

NLRB v. *Local 825, Operating Engineers*, 400 U.S. 297, 304, declared, "Some disruption of business relationships is the necessary consequence of the purest form of primary activity" and that "These foreseeable disruptions are, however, clearly protected", citing *United Steelworkers of America* v. *NLRB*, 376 U.S. 492, and *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 682. These pronouncements are consonant with the recognition in *Teamsters, Local 710*, that "Thus the 'cease doing

business' language in §3(e) cannot be read literally because inherent in all subcontracting clauses, even those admittedly primary, is refusal to deal with at least some contractors" (335 F.2d 714).

B. The Sixth Circuit's Prior *Canada Dry Case* Conflicts With the Sixth Circuit's Opinion Herein.

Heretofore and *contrary* to the Sixth Circuit's rejection herein of UMW's "claimable work" contention, the Sixth Circuit's *Canada Dry Corp.* v. *NLRB*, 6 Cir., 421 F.2d 907 (1970), refused an employer's claim that a union sought "*work acquisition*", as distinguished from "*work preservation*", saying "these were the type of jobs which the clerks had traditionally done and for which they had the skills and experience" and that:

> "Although the tasks of initially handling and shelving the particular brand name products in issue had not been traditionally performed by the store clerks, we do not regard the clerks' claim to these jobs as representing in any realistic sense an attempt to . . acquire new job tasks" (p. 909).[3]

C. Contrary to Respondent-, UMW's Objectives Were Primary and Not Secondary, and the District Court So Found.

In urging upon this Court that UMW's coercion had secondary objects (O.B. 30-36), Respondents, in quoting from district court findings and conclusions, have *failed* to include other crucially relevant portions thereof.

Illustrative thereof: Respondents quote (O.B. 32) as follows:

> "*Another object* of the said strike was to force or require Riverton and Davison to *cease using*, sel-

[3]Notably, the Sixth Circuit's *Canada Dry* opinion affirms NLRB's holding. Additionally, the Sixth Circuit's *Canada Dry* opinion (p. 910) cites, with approval, NLRB's holdings in *Brentwood Markets*, 171 NLRB 1013 (1968) and *Cala Foods*, 172 NLRB No. 200, 69 LRRM 1189.

> ling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to *cease doing business* with such producers",

that

> "Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers even though the defendant Union had not been certified as the representative of such employees under the provisions of Section 9 of the Act",

and that

> "An object of the April, 1964, strike at Riverton was to force or require Riverton to enter into the proposed 1964 printed form amendment to the National Bituminous Coal Wage Agreement of 1950",

but *Respondents carefully avoid directing this Court's attention to paragraph 39's additional language, reading:*

> "After Riverton signed the 80-cent clause, and as a result thereof, some fifteen non-union producers from which Riverton had been buying supplemental coal became signatories to the UMW agreement. Some twenty-two did not—*so the effect was not to 'force' or 'compel' but to encourage. Such 'encouragement' was not a primary object of the strike—it was a recognized incident. The design or purpose or object remained—job protection*" (A.25a).

Similarly, Respondents quote (O.B. 32) from the district court's conclusion as follows:

> "A proximate result of the 80-cent clause [in the agreement] to Riverton was to *force it to cease*

> *dealing in the products of other* producers of coal i.e., *producers who were not unionized*",

but again Respondents are careful not to apprise this Court that the district court's conclusion continued with the following language:

> "*While these were proximate results and foreseeable effects, none of them, nor the collection of them, constituted the primary purpose for exacting the 80-cent clause bargain. That was to prevent subcontracting, preserve Riverton's employees' work, maintain union standards in the production of coal which could just as well have been produced by Riverton and protect the integrity of the Welfare Fund*" (A.56a).

Respondents' admission (O.B. 32-33) that the Sixth Circuit "relied upon the above findings of the District Judge in reversing and directing the entry of judgment for the Respondents" clearly demonstrates the applicability of UMW's reliance upon "claimable work" and the authorities cited by it in support of its contention.

A basic error of Respondents in pressing upon this Court that UMW is guilty of secondary objectives is their ignoring that to be guilty of a Section 8(b)(4) violation, there is a positive necessity that the condemned conduct relate to a concomitant banned objective. *Local 1976, Carpenters* v. *NLRB*, 357 U.S. 93, 98 (1958). The discussion herein has demonstrated that Section 8(b)(4)(i)(ii)(A)'s objective is permissive under *National Woodwork*. Similarly, *Houston Insulation Contractors Assn.* v. *NLRB*, 386 U.S. 664 (1967), holds that collective activity of employees of a primary employer, the objective of which is to affect labor policies of that employer *is protected primary activity* under the Act's Section 8(b)(4)(B) and "*A boycott cannot be-*

come secondary because engaged in by primary employees not directly affected by the dispute."

D. UMW's Response to Respondents' Claim "There is No Conflict Between the Circuits"

Arguing the Sixth Circuit's decision to be "the first and only decision in any Circuit" in a Section 303 damage action involving the validity of the UMW's 80-cent and coal land clauses (O.B. 46), Respondents concede the District of Columbia Circuit's concern with the 80-cent clause in *Lewis* v. *NLRB*, 350 F.2d 801 (1965) and *Int. Union, UMWA* v. *NLRB*, 399 F.2d 977 (1968). Though arguing the district court's assertion that "an admitted substitute is the equivalent of what it was substituted for" to be a basic error (O.B. 47), Respondents do not deny that their Dan S. Davison was an intervenor in *Int. Union, UMWA* v. *NLRB*, D.C. Cir., 399 F.2d 977, 980, and that the District of Columbia Circuit's reference to "everyone's admission and our characterization a substitute for the union standards clause" (meaning PWC) included Respondents' Davison. Nor do Respondents challenge UMW's certiorari petition statement (Pet. 31-34, 39) that pursuant to the District of Columbia Circuit's indicia, NLRB has declared the validity of PWC and the 80-cent clause as permissive under Section 8(e). Further, if, as the Sixth Circuit quoted, NLRB "has not been consistent in its rulings on either the 80-cent or the PWC clause" (A. 73a), neither has the Sixth Circuit been consistent with reference to PWC, since in both *Lewis* v. *Pennington*, 400 F.2d 806, 814 (1968). cert. den. 393 U.S. 983, reh. den. 393 U.S. 1045, and *Ramsey* v. *UMW*, 416 F.2d 655 (1969), reversed on other grounds 401 U.S. 302, the Sixth Circuit has validated PWC.[4]

In any event, as UMW asserts in its petition (pp. 31-34), NLRB has sanctioned the challenged clauses' validity pursuant to the District of Columbia Circuit's indicia which condemned the Sixth Circuit's preference for NLRB's prior decisions, and, as the certiorari petition (p. 40) pointed out, such preference conflicts with this Court's *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) that "The administrative interpretation of the Act by the enforcing agency is entitled to great deference".

The foregoing discussion demonstrates the Sixth Circuit's reversal of the district court's findings and conclusions pertaining to the Act's Section 8(e) resulted from its failure to recognize UMW's contention of "claimable work", to its willingness *to segregate* portions of such findings and conclusions rather than premise its decision on them *in their entirety*, and by its preference of adopting NLRB decisions which the District of Columbia Circuit *rejected* rather than accepting NLRB's validation thereof.

Furthermore, since UMW's objectives were primary and not secondary, UMW could not have violated Section 8(b)(4)(i)(ii)(A) and (B), by reason whereof the district court appropriately dismissed the action and complaint, just as NLRB did upon validating the 80-

---

[4]While the Sixth Circuit's *Tennessee Consolidated Coal Company* v. *UMWA*, 416 F.2d 1192, 1198, found PWC "to boycott coal not produced in conformity with the National Agreement" (O.B. 47), its finding related to a jury finding as to an antitrust violation. While the district court sanctioned the jury finding, its belief that PWC was valid is expressly reflected in its statement that, "If this Court were sitting as a trier of the facts in the present case, it would make the same findings of fact on the present record as it made upon the record in the *Ramsey* case"—wherein it found PWC valid—and that its approval of the jury verdict "does not indicate . . the Court concurs in the verdict" (See petition for certiorari, Case No. 1163, October Term, 1969, styled *UMWA* v. *Tennessee Consolidated Coal Company, et al.*, Appendix, pp. 50a and 58a, and 416 F.2d 1199).

cent clause in *Int. Union, UMWA* (76 LRRM 1396, fn. 12). Had the Sixth Circuit pursued prior important decisions and principles of this Court, the D. C. Circuit and NLRB, *and indeed the principles accepted by it in its own Canada Dry case,* and had it followed the command of Rule 52(a), Federal Rules of Civil Procedure, it would have approved the district court's findings and conclusions with reference to the challenged clauses and UMW's objectives. Its failure so to do has resulted in the Sixth Circuit's conflict therewith, thereby inviting this Court's award of certiorari herein.

III. UMW'S REPLY TO RESPONDENTS' ARGUMENT THAT UMW COERCED RIVERTON AND DAVISON, AND THAT THERE IS NO CONFLICT WITH THE *CORONADO* CASES.

The 1964 Work Stoppage.

Facts and the district court's findings and conclusions with respect to the 1964 stoppage, found in the certiorari petition (pp. 16-22), in the Sixth Circuit's holdings with reference thereto (Pet. 27-29) and argued therein as a predicate for this Court's award of certiorari (Pet. 40-43), are to be compared with facts (O.B. 9-14), district court findings (O.B. 19-21), the Sixth Circuit's holdings with reference thereto (O.B. 21-22) and argument (O.B. 25-30) with respect to the 1964 stoppage, found in Respondents' opposition brief.[5] *Relevantly, UMW directs the Court's attention that the district court found the 1964 stoppage's design, purpose or object remained "job protection"* (A. 25a).

The 1966 Work Stoppage.

Facts and the district court's findings and conclusions

[5]UMW concedes its error pointed out by Respondents (O.B. 26, fn. 3) that the word in the quoted language therein is properly "in" rather than "not", as stated in the certiorari petition (p. 22).

with respect to the 1966 stoppage, found in the certiorari petition (pp. 22-26) and the Sixth Circuit's holdings relating thereto (Pet. 29-30) and argued therein as a predicate for the award of certiorari herein (pp. 43-47), are to be compared with facts (O.B. 14-16), district court findings (O.B. 20), the Sixth Circuit's holdings relating thereto (O.B. 21) and argument (O.B. 28-30) with respect to the 1966 work stoppage, found in Respondents' opposition brief.

Even if District 17 is a UMW agent, UMW submits that Respondents' assertion (O.B. 27), "It is clear . . that District 17's officers and representatives, including R. R. Humphreys and Emery McCoy, were acting as agents of the UMW in 1964 and that UMW is responsible for their actions" is a *non sequitur*, and UMW's discussion (Pet. 40-43) is a challenge to Respondents' statement (O.B. 27), "On the basis of the substantial evidence summarized above, directly linking the UMW through its authorized agents with the 1964 strike, the District Judge properly found and concluded that" UMW "in 1964 induced and encouraged individuals employed by the plaintiff to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B)" (O.B. 27-28).

Contrary to Respondents' claim that "There is no conflict with the *Coronado* decisions" (O.B. 42), UMW's certiorari petition (pp. 41-45), dealing with the 1964 and 1966 work stoppages and UMW's non-responsibility therefor, demonstrates the Sixth Circuit's conflict with *UMWA* v. *Coronado Coal Co.*, 259 U.S. 344, and *Coronado Coal Co.* v. *UMWA*, 268 U.S. 295; and nothing in Respondents' brief (pp. 42-43) differs from UMW's basic

position that in a Section 303 action the ordinary rules pertaining to the law of agency obtain.

Respondents' opposition brief (pp. 42-45) is totally silent concerning UMW's charge that the Sixth Circuit's opinion conflicts with *Walters* v. *Int. Assn. of Plumbers*, 6 Cir., 323 F.2d 578, which rejected a judgment against a parent organization because

> "There is no evidence . . that [the parent organization] participated in any way in the placing of the picket or ratified the picketing".

Nor is there Respondent contention of the inapplicability of *Harnischfeger Corp.* v. *Sheet Metal Workers*, 6 Cir., 436 F.2d 351 (1970)—a Section 303 action—which approved district court findings as *"not clearly erroneous"*, which held, *inter alia*, "the International Union did not authorize the picketing" and "the international representative did not assert or claim to assert authority to terminate the picketing" (436 F.2d 356).[6]

Since Respondents premise UMW's responsibility for the 1964 work stoppage on the conduct of Emery McCoy, District 17's field representative (O.B. 10-11), the Court's attention is directed to the Fourth Circuit's *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, which, in contrast to Respondents' claim herein, rejected the doctrine of imputed liability for the acts of a regional director and field representatives on the ground that they did not have implied authority to

---

[6] *Harnischfeger* noted instances of a parent labor organization's being held liable where it "engaged in a joint enterprise with a local or responsible for the activities of the local and its agents", or "when the International admitted having joined the local in authorizing the general conduct", or "when the International through its constitution or bylaws or by some other means commanded or required the activities resulting in the unfair labor practices", or "when the International controlled the operations of the local" (436 F.2d 356).

Unrefuted evidence herein is that neither District 17 nor UMW had anything to do with the stoppage (J.A. 439).

adopt, on the parent union's part, a "wildcat" strike conducted by a local union. Thus, UMW submits that its cited authorities, and particularly its discussion of *Coronado* (Pet. 44-45) in relation to the work stoppages and UMW's responsibility therefor, are apposite herein.

Respondents' cited authorities to support their contention that when Emery McCoy told union members there was no contract, the statement was a "signal" for strike action (O.B. 44, fn. 6), are discussed below:

Though *U. S.* v. *Int. Union, UMW*, DC, D.C., 1948, 77 F.Supp. 563, aff'd. D.C. Cir., 177 F.2d 29 (1949), held a functioning union to be responsible for its members' mass action, the instant case differs totally from the factual situation therein where, in an industrywide stoppage, *the district court found the parent union (UMW) responsible because it had provoked the strike.* There is neither plaintiff contention nor district court finding that in the instant case UMW authorized, participated in, or ratified the 1964 stoppage so as to render applicable *U. S.* v. *Int. Union, UMW*. Moreover, the mass action theory may not be considered as a statement of principle in isolation from the factual situation, but must be treated as cognate to the finding therein that UMW had devised "a new method of avoiding responsibility" by means of a "nod, or a wink, or the use of a code in order to call a strike". *First Coronado* rejects the mass action theory, avowing responsibility "is a mere question of actual agency" (259 U.S. 395).

Moreover, in *U. S.* v. *Int. Union, UMW*, DC, D.C., 1950, 89 F.Supp. 179, the district court, though recognizing the mass action doctrine, *refused to apply* it, even though, as herein, UMW failed to revoke local union charters but, as herein, instructed its members to return

forthwith to work and there was an absence that strike benefits had been used to aid striking miners.[7]

Respondents misconceive (O.B. 44-45) UMW's purpose in citing *UMW* v. *Gibbs*, 383 U.S. 715 (1966) [Pet. 21, 44] which was in fact responsive to the Sixth Circuit's holding that UMW "did not undertake to discipline the strikers" and "Its inaction was a form of influence and persuasion". UMW pointed (Pet. 44) to *Gibbs'* holding that "*There can be no rigid requirement that a union disavow strike activity which it had not authorized.* UMW likewise directed attention (Pet. 44) to Mr. Justice Harlan's concurrence in *Gibbs* that *a union's failure "to take affirmative action to dispel misconduct are not in themselves proof of authorization or ratification of the wrongdoing"* (p. 743).

Relevantly, just as the opposition brief contains no response to the *Gibbs* quotations, the same is true of UMW's quotation (Pet. 44) from *Int. Ladies Garment Workers Union* v. *NLRB*, D.C. Cir., 237 F.2d 545, 552, which cites *first Coronado* (259 U.S. 395) as support for its holding that there is no need for disavowing misconduct by a party which has not initiated or participated therein and that "silence provides no rational basis for inferring" UMW acquiesced in the stoppages.

Lewis v. *Benedict Coal Co.*, 6 Cir., 259 F.2d 346 (1958) [modified on other grounds, 361 U.S. 459 (1960)] did not involve the doctrine of "mass action" but made clear that "wildcat" strikes could not serve as a predicate for a parent union's liability. *Benedict's* inapplicability is emphasized by the fact that it did not concern, as does the instant case, unrefuted evidence affirmatively demon-

---

[7]Subsequently, the District of Columbia Circuit in *U. S.* v. *Int. Union, UMW*, 190 F.2d 865 (1951) dismissed the action as "moot".

strating efforts to have Riverton employees return and continue to work (J.A. 1065-69), and uncontradicted evidence that strike action was voluntary on the part of Riverton employees (Pet. 16, *et seq*).

These same factors emphasize the inapplicability of *Vulcan Materials Co.* v. *Steelworkers*, 5 Cir., 430 F.2d 446 (1970), where the Fifth Circuit declared "It is equally clear that the Unions, through their agents, induced and encouraged the Vulcan employees to refuse to report to work . ." (p. 456).

Similarly inapposite is the Fourth Circuit's *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F.2d 217 (1963), cert. den. 375 U.S. 818 (1963), where the union contended the stoppage was a "wildcat" strike, undertaken without union sanction and actively opposed by it, its issue was whether the union could enforce arbitration of discharged employees engaged therein; *and the Fourth Circuit held the employer's "argument against arbitration cannot prevail" and the union was exonerated of liability.*

Notably, while the certiorari petition (p. 43) observed the district court's characterization of the two McCoys' testimony as "less than candid", the certiorari petition pointed to this Court's *C. & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 219-20, that:

> "It is not proper to submit uncontradicted testimony to a [factfinder] for the sole purpose of giving the [factfinder] an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness . ."

and the Tenth Circuit's *Browning* v. *Crouse*, 356 F.2d 178, expresses it thus:

> "Unimpeached, positive testimony may not be disregarded, even though adduced from interested witnesses, *and no question of credibility or issue of fact is presented for determination by a trier of fact*".

Significantly, Respondents' opposition brief makes no challenge of the relevancy of these cases, nor is it responsive to Petitioner's citations of *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578, that "Speculation cannot supply the place of proof" and *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 340-41, which precludes the use of inferences as proof where there is "uncontradicted testimony of unimpeached witnesses . . that the fact sought to be inferred did not exist".

UMW submits Respondents' contention that the Sixth Circuit's decision presents no conflict with *Coronado* is erroneous and should be rejected.[1]

UMW's certiorari petition (p. 46), challenging the Sixth Circuit's reversal of the district court's exoneration of UMW for the 1964 and 1966 stoppages, notes the Sixth Circuit's failure to dispute a single finding upon which that exoneration was based, including the district court's corroboration by the United States Department of Labor (Pet. 24). *Since, as the certiorari petition (pp. 22-24) shows, the Bureau of Labor Statistics is corroborative of UMW's position and the district court's findings and conclusions that "With respect to the 1966*

---

[1] Since Respondents' opposition brief directed attention that the Sixth Circuit found the 1964 contract "'was in effect a no-strike contract', so the 1966 strike like that in 1964 was in breach of contract and also violated Section 8(d) of the Act" (O.B. 28), it is crucial that the Court note the district court's declaration that the instant action was not one for breach of contract under the Act's Section 301 [A. 30a, 57-58a (60, 86)] and, further, the district court declared that, concerning the "no-strike contract", its findings "had no effect on the decision of this Court" [A. 30a (60)]. Indeed, *neither in pleadings, the evidence nor in arguments did the issue of no-strike contract or violation of Section 8(d) arise.*

strike, the district court concluded 'there is no evidence . . based on which this Court could say' plaintiffs maintained the burden of proving by a preponderance that 'District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton' and that 'There is certainly no connection whatever between the 80-cent clause in either the 1964 or 1966 contract and the 1966 strike'" (Pet. 25-26), *it becomes significant that Respondents' opposition brief contains no response thereto.*

Respondents attempt to support the Sixth Circuit's reversal on the basis that the district court's findings of non-inducement or encouragement were "not supported by evidence and are clearly erroneous" by pointing to the Sixth Circuit's holding that by UMW's failure to correct the local union's alleged "unlawful action" and an acceptance of benefits in lieu thereof, UMW "thereby induced and encouraged both the 1964 and the 1966 strike", and that the only way Riverton could terminate the [illegible] to sign the 1966 Agreement, which it did under protest (O.B. 29).

But, failure to take corrective action is not a judicial requisite, as UMW's certiorari petition (pp. 45-47) has abundantly shown, and as the district court in *U. S.* v. *Int. Union, UMW*, D.C., D.C., 1950, 89 F.Supp. 179, recognized (*ante*, p. 10). Moreover, Respondents' citation of *Teamsters* v. *Humko*, 6 Cir., 387 F.2d 231, is answered by UMW's showing (Pet. 43) that the Sixth Circuit's *Harrischfeger* pointed out that *Humko* "relied in part upon the provisions of the international union's constitution in finding that the international participated as a 'principal actor' in the secondary boycott there in question" (436 F.2d 353). Indeed *Humko* emphasizes that the international union exercised a degree of dominion over the local union, depriving it of that degree of inde-

pendence associated with autonomous organizations (287 F.2d 242), *a situation which is totally dissimilar herein.*

Contrary to Respondents' contention that UMW was responsible for the 1966 stoppage "because of its control of and domination of its Locals, which have no real autonomy" (O.B. 30, 48), *under UMW's Constitution, local union officers are elected by secret ballot of local union members and are paid from dues allocated to a local union pursuant to UMW's Constitution* (J.A. 424, 440). *Regular local union meetings are scheduled pursuant to by-laws of local unions; and special meetings are called either by the local union's president or members thereof who request the calling of such special meeting* (J.A. 616-64, 424, 440, 444).[9]

Respondents' effort to dissipate UMW's contention that the Sixth Circuit's holding concerning Local 1209 conflicts with *Harnischfeger* and other cited cases (Pet. 46; O.B. 48, fn. 8), on the premise, as Respondents stated that "None of the above decisions involve the" UMW *is not of juridical relevance.* The Sixth Circuit, the Court will recall, grounded UMW responsibility for the stoppages on the theory that "Local 1209 was not an autonomous labor organization *separate and apart for UMW*" and "an administrative arm" thereof and was supervised, dominated and controlled by UMW (A. 75a). Yet, each of the cited cases, including the Sixth Circuit's *Harnischfeger* and *Garmeada Coal Co.* v. *UMW*, DC, E.D. Ky., 1954, 122 F.Supp. 512, aff'd. 6 Cir., 230 F.2d 945, judicially proclaim a local union is a legal entity apart from its parent international organization.[10]

---

[9] Respondents' citations (O.B. 30) do not support their allegation of UMW's control over and domination of its locals (J.A. 640-64, 436-44) but, to the contrary, support UMW's position of local union autonomy.

[10] See Appendix A hereto for "Additional Findings and Conclusions" in the district courts' *Garmeada.*

Respondents seek to disarm this Court by asserting "The 1966 strike is of minor importance in the case" (O.B. 30). It admits nonetheless that the Sixth Circuit included in its award of damages $36,128.50 as attributable to the 1966 strike. Hence UMW challenges Respondents' characterization of the 1966 strike as "of minor importance".

The foregoing discussion emphasizes UMW's reasons (Pet. 47) for the award of certiorari herein.

IV. UMW'S REPLY CONCERNING THE SIXTH CIRCUIT'S FAILURE TO FOLLOW RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

UMW's certiorari petition (p. 40) complains that the Sixth Circuit's reversal of district court findings that the challenged clauses were permissive under the Act's Section 8(e) conflicts with Rule 52(a), Federal Rules.

Respondents undertake to avoid such failure on the ground that the Sixth Circuit "relied on the findings of fact of the trial court" (O.B. 33, fn. 5); but, as already shown (*ante*, pp. 8-10), those findings were wholly incomplete and thus did not meet the Rule's requirements that "Findings of fact shall not be set aside unless clearly erroneous".

At variance with the Sixth Circuit's action herein, it implemented the Rule's mandate in *Harnischfeger* (436 F.2d 356).

V. UMW'S REPLY TO RESPONDENTS' CLAIM THAT DAVISION IS A PROPER PARTY.

UMW's certiorari petition (pp. 47-49) contains its position that the Sixth Circuit holding that Davison is a proper party plaintiff is erroneous. UMW believes its

discussion therein suffices as an appropriate answer to Respondents' contrary claim (O.B. 36-38).

CONCLUSION

For the reasons assigned in its Petition for Certiorari and herein, UMW (Petitioner) prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the judgments and opinion of the United States Court of Appeals for the Sixth Circuit entered January 21, 1972, in Cases Nos. 71-1021 and 71-1022, as set forth in said Petition. UMW (Petitioner) intends to urge each of the questions presented, even if not specifically argued in its Petition or herein.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C. 20005

E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee 37901

ROBERT I. DOGGETT
2222 Kroger Building
1014 Vine Street
Cincinnati, Ohio 45202

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, W. Va. 25301

Attorneys for Petitioner,
United Mine Workers of America

June 1, 1972